

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

THE WILLIAMS -CARVER COMPANY,

Plaintiff,

v.

**ROBERT W. VENTURI d/b/a/ VENTURI
GROUP and/or MARENGO
WAREHOUSE & DISTRIBUTION
CENTER,**

Defendant.

CIVIL ACTION

No. 04-2088-CM

MEMORANDUM AND ORDER

On January 26, 2004, plaintiff filed this civil action against defendant in the District Court of Wyandotte County, Kansas. Defendant removed the case to this court on March 2, 2004. Plaintiff alleges that defendant failed to pay plaintiff for refrigeration work it performed at defendant's warehouse and distribution center in Indiana (the "Project"). Plaintiff brings claims for breach of contract, quantum meruit, and suit on account. This matter is before the court on defendant's Motion to Dismiss or, in the Alternative, for Transfer (Doc. 3).

Defendant originally moved to dismiss this case for lack of personal jurisdiction. In response, plaintiff submitted an affidavit setting forth facts sufficient to satisfy the requirements for personal jurisdiction. In reply, defendant withdrew its motion requesting dismissal of this case. The court therefore turns to defendant's request to transfer.

I. Facts

Plaintiff is a corporation residing in Kansas City, Kansas. Defendant resides in Illinois. In 2001, defendant approached plaintiff to perform refrigeration work at defendant's Indiana facility, known as the Marengo Warehouse and Distribution Center (the "Warehouse"). Plaintiff prepared a proposal at its Kansas City office to perform the refrigeration work at the Warehouse. On August 2, 2001, plaintiff transmitted the proposal to defendant via facsimile. On October 3, 2001, defendant transmitted the proposal with his signature via facsimile to plaintiff in Kansas City and also mailed the original to plaintiff in Kansas City.

In connection with the installation of the refrigeration and equipment at the Warehouse, plaintiff performed work at its Kansas City office, including shop design and layout of the equipment, prefabrication of the chiller equipment, preparatory work on the compressor, and general preparation of the equipment to ready it for installation. Plaintiff worked with a consultant retained by defendant, Robert Dyer of RD Consulting, whose office is located in Kansas. Plaintiff also received at its Kansas City office some payments from defendant.

In January 2002, plaintiff began installation of the refrigeration equipment at the Warehouse. Defendant's employees performed much of the work required by the contract under plaintiff's supervision. By July 2002, plaintiff completed work on the project. Defendant alleges that there were problems with plaintiff's equipment, ultimately causing the failure of the Warehouse to reach zero degrees within the time promised. Plaintiff alleges that defendant has refused to pay plaintiff for its labor and materials, while defendant claims that any alleged breach of contract by him is due to plaintiff's failure to utilize adequate equipment.

II. Standard

Under 28 U.S.C. § 1404(a), a civil action may be transferred to any other district where it could have been originally brought for the convenience of the parties and the witnesses. Included among the factors to be considered in evaluating a transfer under § 1404(a) are the plaintiff's choice of forum, the convenience of witnesses, the accessibility of witnesses and other sources of proof, the relative advantages and obstacles to a fair trial, and "all other consideration of a practical nature that make a trial easy, expeditious and economical." *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1515-1516 (10th Cir. 1991). Unless the balance is strongly in favor of the movant, the plaintiff's choice of forum should rarely be disturbed. *Scheidt v. Klein*, 956 F.2d 963, 965 (10th Cir. 1992).

III. Discussion

Defendant urges the court to transfer this case to the New Albany Division of the United States District Court for the Southern District of Indiana based upon the convenience of the parties and witnesses and the location of significant events.

Defendant first contends that defendant likely will assert a counterclaim and that, to the extent plaintiff subcontracted its work to others, plaintiff will in turn likely assert third-party claims against those subcontractors. Defendant argues that those subcontractors may not be subject to this court's jurisdiction and that, as a result, this case may be delayed while the court considers jurisdictional challenges or may have to proceed in another judicial district where those subcontractors can be sued. The court, however, considers defendant's argument highly speculative in nature at this juncture in the litigation and, therefore, does not deem this a significant factor in this decision.

With respect to the convenience of the parties and witnesses, the court notes that there are witnesses located in Kansas, Indiana, and Illinois. Richard Carver, plaintiff's employee, and Robert Dyer,

defendant's consultant, both reside in the Kansas City area. Defendant resides in Illinois, and defendant's employees who worked on the Project reside in Indiana. Defendant asserts that there are three consultants (from Indianapolis, Indiana, and Louisville, Kentucky) whom defendant hired to look into the refrigeration equipment problems and that those consultants could not be subpoenaed to testify in Kansas. However, the fact that a witness may not be compelled to attend trial by subpoena does not require a change of venue. The deposition of the witness may be taken and used at trial or, if defendant wants the trier of fact to see the witness in question, a videotaped deposition can be used.

Finally, the court turns to the location of significant events. Defendant points out that plaintiff ultimately installed the refrigeration equipment at the Warehouse in Indiana. However, plaintiff contends that it performed work related to the equipment installation at its Kansas office. As such, significant events with respect to performance of the contract occurred in both Indiana and Kansas.

The court finds that defendant's requested transfer is unwarranted in this case. Trial in Kansas will inconvenience defendant, but trial in Indiana would equally inconvenience plaintiff. Defendant has not established that its relative inconvenience is sufficiently disproportionate to overcome plaintiff's presumptive right to select a forum. Accordingly, because a venue transfer would succeed only in shifting the inconvenience to plaintiff, the court will not disturb plaintiff's choice of forum, which is entitled to significant deference. The court denies defendant's motion to transfer.

IT IS THEREFORE ORDERED that defendant's Motion to Dismiss or, in the Alternative, for Transfer (Doc. 3) is denied.

Dated this 3 day of May 2004, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge